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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 779 .

THE AMERICAN TOBACCO CO.; R. J. REYNOLDS TOBACCO CO.; BANK OF GREECE; BROWN & WILLIAMSON TOBACCO CORP.; COMMERCIAL CO. OF SALONICA, LTD.; JOHN D. NICOLAOU and NICHOLAS NICOLAOU, co-partners, doing business as D. Nicolaou Sons & Co.; A. MICHAELIDES, S. A.; and MACANDREWS & FORBES CO.,

Petitioners,

—against—

J. C., N. C. and A. C. HADJIPATERAS and HELLENIC LINES, LTD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The American Tobacco Co.; R. J. Reynolds Tobacco Co.; Bank of Greece; Brown & Williamson Tobacco Corp.; Commercial Co. of Salonica Ltd.; John D. Nicolaou and Nicholas Nicolaou, co-partners, doing business as D. Nicolaou Sons & Co.; A. Michaelides, S. A.; and MacAndrews & Forbes Co., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 2223-2243) is reported at 81 F. Supp. 438. There was a supplemental memorandum (R. 2244) and the court filed detailed findings of fact and conclusions of law (R. 2245-2265). The opinion of the Court of Appeals for the Second Circuit (R. 2346-2351) is reported at 194 F. (2d) 449.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was filed on February 20, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

Statement.

Your petitioners were the owners of tobacco and licorice root laden on the Greek S. S. "Katingo Hadjipatera" at Eastern Mediterranean ports for carriage to United States ports. Hereafter we shall refer to the vessel as the "Katingo." J. C., N. C. and A. C. Hadjipateras were Greek citizens doing business as Hadjipateras Brothers, who owned the vessel. We shall hereafter refer to them as "Hadjipateras." Hellenic Lines, Ltd., was the charterer of the vessel which it put on berth as a common carrier; it issued the bills of lading as the contracts of carriage. We shall refer to it hereafter as "Hellenic."

The cargo of your petitioners became seriously damaged during the course of the voyage. Hadji-

pateras filed a petition for limitation of liability under U. S. C. Title 46, sec. 183-5 and your petitioners filed claims and answers to the petition in the limitation proceedings. Your petitioners also filed libels *in personam* against Hellenic as the contracting carrier and those libels were consolidated with the limitation proceedings instituted by Hadjipateras.

Fire broke out in #3 hold of the "Katingo" during the voyage. The District Court found that Hadjipateras were not liable for any of the damage sustained by the tobacco and licorice root carried on the vessel but that Hellenic was liable for the damage sustained by most of the tobacco carried in the #3 tween deck and #3 hold and for the damage to the licorice root in the #3 hold. The Court of Appeals for the Second Circuit affirmed the decision of the District Court as to Hadjipateras; but it reversed the decision below that Hellenic was liable for the damage to the tobacco and licorice root carried in the #3 compartments.

The Questions Presented.

1. *Do the statutes which provide that an ocean carrier shall not be liable for fire (U. S. C. Title 46, sec. 182; sec. 1304 (2) (b))* afford an exemption for all damage to all cargo stowed in a compartment where a fire eventually breaks out, when fire was not the proximate cause of most of the damage?*

Most of the damage sustained by the tobacco in the #3 compartments was caused by the heating of

* Set out in supporting brief at p. 22.

the tobacco of your petitioner, Brown & Williamson Tobacco Corp., before that tobacco ignited. The ignition of the Brown & Williamson tobacco did not increase its own damage because it was already worthless. However, when it did ignite, heat from that fire and contact with water used to extinguish it, increased the damage sustained by the other tobacco in the #3 compartments which was not already worthless, the extent of that increased damage being largely undeterminable.

The statutory fire exemptions are only applicable after cargo actually ignites with a visible flame.

The Buckeye State, 39 F. Supp. 344 at p. 347 (W. D. N. Y.);
Cargo Carriers Inc. v. *Brown S. S. Co. et al.,* 95 F. Supp. 288, at p. 290 (W. D. N. Y.);
Western Woolen Mill Co. v. *Northern Assurance Co.,* 139 Fed. 637 (C. C. A. 8).

We submit that a carrier who seeks the benefit of the statutory exemptions from liability for fire must prove that the damage in relation to which he seeks exemption proximately resulted from fire. When part of the damage resulted from fire and part from other causes and the carrier is unable to prove what part of the damage resulted from fire, he has not established his right to the benefit of the statutory fire exemptions. *The Vallescura,* 293 U. S. 296 at pp. 303-4.

We submit that it cannot possibly be said that a carrier is free from liability under the statutory fire exemptions, for damage to cargo which was never on fire and which was not damaged by the heat of a fire

or by water used to extinguish a fire, merely because it became damaged while in a compartment where fire subsequently broke out.

The Fire Statute affords a vessel owner exemption from liability for damage "which may happen * * * by reason or by means of any fire"; and the Carriage of Goods by Sea Act fire exception relates to "loss or damage arising or resulting from * * * fire."

The District Court held that the Fire Statute exonerated Hadjipateras from liability for all damage sustained by all the cargo in the #3 compartments on the authority of *The Venice Maru,* 133 F. (2d) 781 (C. C. A. 2), affirmed 320 U. S. 249. In that case fire broke out in fishmeal spontaneously. Apparently smoke from the fire was the first sign that it had been heating. While presumably the meal must have heated for an appreciable length of time before it fired, over what period the prior heating extended did not appear. The greater part of the damage involved in that suit was to cargo other than the fishmeal and was the direct result of the fire which eventually broke out. No point was made of the matter by cargo owners, so far as concerns the fishmeal, and all courts merely agreed with counsel that all of the damage sustained by cargo was the proximate result of fire.

In the present case, the District Court did not deal with the question we present, so far as concerns Hellenic, as it held that Hellenic was not entitled to the fire exception of the Carriage of Goods by Sea Act in connection with any of the cargo in the #3 compartments.

The Court of Appeals did not discuss this question except to say (R. 2349-2350):

> "Since the trial judge correctly found on the evidence that there was no fault in the stowage or care and custody of this tobacco previous to the fire, we conclude that, all else aside,[11] the trial judge correctly rejected the contention that exculpation must be denied as to that portion of that tobacco which may have been—which was not proved not to have been—in whole or part damaged (through heat in the course of the voyage or otherwise) before the fire broke out."

In its note "11" the court cited *The Venice Maru* (*supra*).

The Venice Maru does not touch at all on the question we present in connection with damage to tobacco not resulting from fire, smoke, the heat of a fire or by contact with water used to extinguish a fire; but which was caused by heat from other tobacco before that other tobacco ignited. Moreover, we submit that *The Venice Maru* has but a remote relationship to the question we raise as to the Brown & Williamson Cavalla lot which became worthless before it ever ignited.

While your petitioners hold the view that the evidence establishes gross negligence in the care and custody of the cargo during the voyage, we are faced with the finding of both courts below that there was no such negligence. As the District Court expressly found that the cargo damage in the #3 compartments proximately resulted from negligence in stowage (Finding 30, R. 2250; Finding 94, R. 2260; Opinion, R. 2233); and the greater part of the opinion of the

Court of Appeals is taken up with an interpretation of that finding, we can offer no explanation for the assertion in the opinion of the Court of Appeals (R. 2349) that the question now under consideration is not presented because the trial judge found that there was "no fault in the stowage."

Moreover, the question we propound is presented whether or not the cargo owners have established that the damage to their cargo in the #3 compartments resulted from negligent stowage, as was found by the District Court.

The District Court found that all the tobacco in the #3 compartments was delivered to the carriers in normal condition for transportation (Finding 91, R. 2260; Opinion, R. 2237). When cargo delivered into the custody of a common carrier in good order subsequently sustains damage while in the carrier's custody, it has the burden of establishing what part, if any, of the damage was from a cause for which it is not liable; and if it cannot satisfy this burden it is liable for all the damage. *The Vallescura,* 293 U. S. 296, at p. 306.

The Court of Appeals held that the cargo owners must carry the burden of proving not only the cause of the damage of the cargo which eventually ignited spontaneously, but also of the other cargo which sustained all or most of its damage before there was any fire. The Court of Appeals did not find that the stowage was proper: it found that cargo owners had not sustained the burden which it held was theirs, of proving what particulars of stowage made it improper.

The Carriage of Goods by Sea Act provides that a carrier shall be liable for damage to cargo resulting from negligence in stowage; and no contractual provision can void that liability (Title 46, U. S. C., sec. 1303 (2), 1303 (8)). Under the ruling below, a carrier escapes liability for heating damage to cargo whether it results from negligence in stowage or from some unexplained reason, if subsequent inaction over a long enough period eventually causes ignition of any part of the cargo in the affected compartment. This, we submit, cannot be. Surely, the policy of the law is to encourage diligence by a carrier, not to encourage inaction.

We submit that both Hadjipateras and Hellenic must carry the burden of proving what part of the damage suffered by the cargo was the proximate result of fire; and that they are liable for all damage not proven to be within the statutory exemptions.

2. *When fire in cargo is caused by negligent stowage, what additional proof is required of a cargo owner under the provisions of the fire exception of the Carriage of Goods by Sea Act* (U. S. C. Title 46, sec. 1304 (2) (b)), *as a condition precedent to recovery from a carrier for the fire damage suffered by the cargo.*

This question presents for consideration the general policy of the law in interpreting and applying the statutory fire exemption of the Carriage of Goods by Sea Act. The exemption is not absolute but conditional. The Act provides exemption to a carrier—

> "for loss or damage arising or resulting from * * * (b) fire, unless caused by the actual fault or privity of the carrier."

It has been held that under this statute the cargo owner must carry the burden of proving the cause of a fire and that some managing representative of the carrier was negligent in relation thereto (*Hoskyn & Co.* v. *The Silver Line (The Silver Cypress),* 143 F. (2d) 462 (C. C. A. 2).

The Court of Appeals meticulously refrained from reversing the specific finding of the District Court that the solid stow of the #3 tween deck of the "Katingo" when the vessel sailed on her voyage, was improper and negligent. In reversing the decision holding Hellenic liable, the Court of Appeals merely found that your petitioners had not established (R. 2348):

> "precisely how the cargo in #3 tween deck was stowed or, particularly, where the 139 bales in the #3 tween deck were placed when the loading was completed on November 2nd, 1940;"

and that, therefore, they had not established (R. 2349):

> "that the stowage of the additional 139 bales in #3 tween deck so impeded ventilation of the #3 hold as to cause the fire damage to cargo stowed there."

As the "Katingo" sailed on her voyage with her #3 tween deck stowed solidly with tobacco, without any means of providing ventilation of the tobacco in the hold by opening the weather deck hatch and without any provision for inspection during the voyage of the tobacco in the #3 hold (Opinion, R. 2229), and it was found that that stowage was negligent (Opinion, R. 2230), we submit that it is quite irrelevant

where any particular shipment of cargo was stowed, inasmuch as the completed stowage was improper.

The District Court had before it the stowage plan prepared at Piraeus before the "Katingo" sailed from that port showing the #3 tween deck solidly filled with tobacco; the testimony of the ship's officers that the #3 tween deck was stowed solidly with tobacco; testimony that the "Katingo" had been stowed by Hellenic's supercargo who reported to its managing director how the vessel was stowed (Finding 22, R. 2248; Opinion, R. 2231); the testimony of Hellenic's managing director that he examined the ship's stowage plan and knew how the vessel was stowed (R. 920-1); that before October 28th he knew she already had all the cargo which she could safely carry on the cool North Atlantic voyage then contemplated (Opinion, R. 2235); that later, when he knew that the "Katingo" would sail on the long hot voyage via the Cape of Good Hope, he ordered the stowage on the vessel of 1552 additional bales (Finding 28, R. 2249; Opinion, R. 2235); and evidence that he knew that 139 of these bales were stowed in the #3 tween deck (Opinion, R. 2235).

The opinion of the District Court makes it clear that it was the overstowage of #3 tween deck which was improper—without relation to which particular shipments created the overstowage (Opinion, R. 2229, 2233, 2234).

The Court of Appeals said (R. 2348) that as Hellenic's managing director

"did not come on board to inspect or direct the

> distribution of the added cargo, there is no evidence that he knew the precise manner of stowing the 139 bales in #3 tween deck."

While the court went on to assume *arguendo* that Hellenic was responsible for any fault in stowage, the whole opinion discloses that the court held the view that before there could be any recovery your petitioners were obligated to prove with meticulous care exactly where every shipment of cargo was stowed and that the carrier was fully informed of the exact location of the stowage of the respective shipments.

The holding of the Court of Appeals that a cargo owner must carry the burden of establishing not only that the fire was caused by the carrier's personal negligence but also the details of the negligence, is in conflict with the decisions of the Court of Appeals for the Fourth Circuit construing the Fire Statute, in *Hines* v. *Butler (The Virginian)*, 278 Fed. 877 at p. 880, and *Bank Line Ltd.* v. *Porter (The Poleric)*, 25 F. (2d) 843 at p. 845; and of the Ninth Circuit in *Pacific Guano & Fertilizer Co.* v. *Williams S. S. Co. (The Willfaro-The Willsolo)*, 9 F. (2d) 940 (N. D. of Calif.), 9 F. (2d) 622 (C. C. A. 9).

A vessel owner is entitled to limit his liability under U. S. C. Title 46, Sec. 183, if damage to cargo occurs "without the privity or knowledge of such owner." If a vessel owner has knowledge of a general condition which presents danger of loss, it has long been held that he is not entitled to limitation of liability.

> *Christopher* v. *Grueby (The Commonwealth)*, 40 F. (2d) 8 at pp. 13-14 (C. C. A. 1);

Petition of Diamond Coal & Coke Co., 297 Fed. 242 (W. D. of Pa.), 297 Fed. 246 (C. C. A. 3); *Sabine Towing Co., Inc.* v. *Brennan (The Edgar F. Coney)*, 72 F. (2d) 490 at pp. 491, 493-4 (C. C. A. 5).

When a vessel is tied up close to a carrier's office and he has ample opportunity to learn of an improper condition or negligent operation which subsequently leads to disaster, he is personally negligent if he does not take steps to obviate the danger, and is not entitled to limitation of liability.

Spencer Kellogg & Sons, Inc. v. *Hicks*, 285 U. S. 502 at pp. 511-512;
Petition of Diamond Coal & Coke Co. (supra) (Third Circuit);
Christopher v. *Grueby*, 40 F. (2d) at p. 14 (First Circuit);
The Calvert, 51 F. (2d) 494, at p. 498 (Fourth Circuit);
The New Berne, 80 F. (2d) 244 at p. 248 (Fourth Circuit);
In re Great Lakes Transit Corp., 81 F. (2d) 441 at p. 444 (Sixth Circuit).

3. *When cargo of a type which may heat spontaneously if not properly cared for, is in good condition at time of shipment for carriage on the voyage which the carrier contracts to make but, subsequently, carriage on that voyage is made impossible and the carrier transports the cargo on a much longer and hotter voyage, must a cargo owner as a condition precedent to recovery from a carrier for damage to his cargo by heating, establish by definite proof that the cargo was in such condition that it could be safely*

carried on the new route, not contemplated when the cargo was stowed?

The District Court found that all of the tobacco on the vessel was in good normal condition for carriage from the ports of loading to U. S. ports on the route contracted for in the bills of lading issued by Hellenic (Finding 91, R. 2260; Opinion, R. 2237).

As only two lots of cargo stowed in the #3 compartments heated spontaneously, the District Court found immaterial the condition of the other lots for carriage on the route eventually undertaken (R. 2238). It held, however, that although the Brown & Williamson Cavalla tobacco and the Volos tobacco owned by American Tobacco Co. was in good condition for carriage on the route originally contracted for, via Gibraltar, it had not been established that it was in proper condition for carriage via Suez and the Cape of Good Hope (R. 2237). For that reason it held that the owners of these two lots could not recover for the damage which these lots sustained, even though improper stowage was a proximate cause of the damage. The District Court discussed (R. 2236) the decision of this Court in *The Vallescura* (*supra*) but held that recovery should be denied because of the decision in *The Niel Maersk*, 91 F. (2d) 932 (C. C. A. 2).

In *The Niel Maersk* a cargo of fish meal heated spontaneously and negligent stowage was proximately related to the heating. However, recovery from the carrier was denied because there was no evidence as to the condition of the fish meal on shipment.

In the instant case it was established that the Cavalla and Volos tobacco was in good condition for

carriage on the route contracted for. As its damage resulted from causes arising subsequent to its stowage on the "Katingo" and as negligence in stowage was the principal cause, we submit that the case presented by the findings of the District Court is governed by *The Vallescura* (*supra*) and that the carriers are faced with the burden of establishing the extent of any damage resulting from causes for which they are not liable.

The Court of Appeals did not discuss this question as it held that Hellenic was not liable for any of the damage to the tobacco. The District Court pointed out (R. 2236-7) that *The Niel Maersk* is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Nichiyo Maru*, 89 F. (2d) 539.

Reasons for Allowance of the Writ.

1. The proper interpretation and application of the Fire Statute and the fire exception of the Carriage of Goods by Sea Act, are of immense importance to cargo owners and ocean carriers: a very high percentage of claims of cargo owners against carriers arises out of fires.

2. It has frequently been pointed out that one of the greatest deterrents of negligence is sure knowledge that liability for negligent damage will fall upon the wrongdoer. Under the decision below a carrier is much better off if he is inactive than if he is diligent: it was held that if damage to cargo caused by negligent stowage is permitted, through long inaction, to develop to the point of ignition of one lot, a carrier is entitled to statutory fire exemptions

in connection with all cargo in the affected compartment, including that which sustains no damage from the fire.

3. While it is the spirit of the fire exemption of the Carriage of Goods by Sea Act that a carrier shall not be liable for damage resulting from fire caused by the negligence of minor employees or agents, it is also its spirit that a corporate carrier shall not escape liability when fire damage to cargo results from improper conditions with which the carrier's managing director was fully conversant. The holding of the Court of Appeals that the statutory exemption inhibits a cargo owner from reliance upon any inference but that he must by affirmative proof establish "precisely how the cargo * * * was stowed", throws a burden on a cargo owner which no other case has required and is in conflict with decisions in other Circuits.

4. The holding that a cargo owner may not recover for heating damage to his cargo which proximately resulted from negligent stowage, unless it is established that the cargo was in actual good order for carriage on the voyage eventually undertaken, even though it is established that the cargo was in good order for the voyage originally contracted for, is in conflict with the principle of the decision of this Court in *The Vallescura* (*supra*); and is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *The Nichiyo Maru,* 89 Fed. (2d) 539 at p. 543. The District Court pointed out this conflict in its opinion (R. 2236-7).

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the

seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings of the case entitled on its docket *"The American Tobacco Co. et al.* against *J. C., N. C. and A. C. Hadjipateras and Hellenic Lines, Ltd.,* Docket No. 21874;" and that the said decree of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

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By HENRY N. LONGLEY,
JOHN W. R. ZISGEN,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In this brief we shall limit ourselves to a summary of the facts of the case pertinent to the questions presented in the petition, and to a short discussion of the findings and conclusions below. We shall largely rely on the findings and opinion of the District Court: the Court of Appeals discussed few facts; it found that, except as specifically noted to the contrary, the evidence supports the findings below. The facts we set out were found by the District Court or where not mentioned in its findings or opinion, they are established by undisputed evidence.

The "Katingo" was placed on berth as a general ship engaged in the common carriage of merchandise by sea, by Hellenic. Its head office was in Piraeus and its managing director was resident there.

On October 28, 1940, when war broke out between Greece and Italy, the "Katingo" lay at Piraeus about to sail for United States ports via Gibraltar (Findings 45-47, R. 2252-3). She was then laden with all of the cargo which she could properly carry on the cool voyage via Gibraltar, to the knowledge of Hellenic's managing director (D. C. Opinion, R. 2229, 2235; Opinion of Court of Appeals, R. 2348). The master also knew that she was then fully loaded (R. 460, 1466, 1650). Her #3 hold was immediately aft of the engine room. At the bottom of that hold licorice root was stowed to a height of about 8 feet and bales of tobacco filled the remainder of the hold. Tobacco also substantially filled the #3 tween deck (D. C. Opinion, R. 2229).

Tobacco, as a vegetable product, presents the danger of spontaneous heating during transportation if it is not carefully stowed and cared for.

The war made it impossible for this Greek flag ship to sail to United States ports via Gibraltar (Finding 48, R. 2253); and the only other possible route was via Suez and the Cape of Good Hope, on which she would cross the Equator twice (Findings 49, 53, R. 2253, 2254).

After it was known that the "Katingo" would sail on the long hot route of about 13,000 miles rather than on the short cool one of about 5,000 miles (Finding 53, R. 2254), instead of taking steps to improve

the ventilation of the tobacco stowed in the hot #3 hold, on November 2nd Hellenic directed the master to stow 1552 additional bales of tobacco on the vessel. Of this lot 139 bales were stowed in the #3 tween deck (Finding 28, R. 2249; Opinion of Ct. of Appeals, R. 2347) and 556 bales in #3 hold (R. 462; Cargo Ex. 30H, R. 2091).

When the "Katingo" sailed on her long hot voyage, her #3 tween deck was stowed solidly with tobacco and, as stowed, no ventilation could reach the tobacco in the hold by opening the weather deck hatch; nor was there any means of access to the hold to permit examination of the cargo stowed there. The officers of the ship testified to the solid stowage (R. 1614, 1469-1471, 1353); the stowage plan prepared at Piraeus by Hellenic before the vessel sailed,* shows a solid stowage (Cargo Ex. 3, contained in a separate folder of exhibits, nine copies of which have been furnished to the Clerk for the use of the Court); the District Court so found (Findings 28-30, R. 2249-2250; Opinion, R. 2229-30, 2233); and the Court of Appeals did not reverse that finding.

The "Katingo" sailed from Elefsis, just outside Piraeus, on November 10, 1940; she was delayed 18 days at the Suez Canal; put in and remained three days at Port Sudan, two days at Mombassa, Kenya, and three days at Lourenco Marques, Portuguese East Africa (Finding 59, R. 2254). She sailed from Lourenco Marques on January 10, 1941, and arrived at Pernambuco on February 4th (Findings 60-61, R. 2255).

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* The Court of Appeals mistakenly asserted that there was no such stowage plan—see statement, *infra*, p. 24.

While the vessel was lying in the tropical ports of Port Sudan, Mombassa, Lourenco Marques and Pernambuco and while she was sailing between those ports, great heat was encountered (R. 1408, 1410, 1412-3, 1421, 1424, 1429, 1434, 1566-7, 1610).

Between Lourenco Marques and Pernambuco clouds of insects emerging from the ventilators serving the #3 hold (Finding 61, R. 2255), gave notice that the tobacco in that hold was heating (R. 793-4); and at Pernambuco abnormal heat was found rising from the ventilators serving that hold (Finding 61, R. 2255). The "Katingo" sailed from Pernambuco on February 4th, put in at Santa Lucia on February 15th, and on February 17th, while the vessel was at sea between Santa Lucia and Newport News, a spontaneous fire broke out in one lot of tobacco stowed in the #3 hold. An opening was made in the stow in the #3 tween deck by removing bales of tobacco to the deck; water was pumped into the hold, and the fire was eventually extinguished (Findings 62, 68, R. 2255-6).

From the time that abnormal heat was first noted rising from the #3 hold—found by the District Court to be on February 4th, while the vessel was at Pernambuco—until the fire broke out some two weeks later, abnormal heat continued to rise from the #3 hold (Finding 65, R. 2255). From the time the "Katingo" sailed from Piraeus on her voyage, on November 10th, until the spontaneous fire broke out in the tobacco in the #3 hold on February 17th (98 days later), the solid stow of tobacco in the #3 tween deck remained undisturbed (R. 1615).

Spontaneous ignition of the tobacco was limited to one lot of bales owned by your petitioner, Brown & Williamson Tobacco Corp., stowed toward the center of the #3 hold (Finding 86, R. 2259). The long continued spontaneous heating had rendered that shipment worthless before it eventually ignited (R. 388, 671). Moreover, before there was any fire, heat from the Brown & Williamson tobacco had rendered worthless or seriously damaged most of the other tobacco stowed in the #3 compartments (R. 388). The fire in the Brown & Williamson lot spread to one adjacent lot only. Water used to extinguish the fire added to the damage of some lots which had not already become worthless before the fire.

Based on the undisputed evidence as to the solid stow of the #3 tween deck when she sailed on her voyage, as established by the stowage plan and the testimony of the ship's officers, and on the expert testimony, the District Court found (Record 2250):

> "30. Stowage of No. 3 tweendeck was improper and negligent in relation to the actual voyage undertaken by the vessel via Suez, in that no passage of any kind was left for access to No. 3 hold below or for the passage of appreciable quantities of air through the tweendeck to and from No. 3 hold below."

The District Court also found that the negligent stowage was a proximate cause of the spontaneous heating of the Brown & Williamson tobacco leading to its eventual ignition (Finding 94, R. 2260).

The District Court held (R. 2234-5) that rights between your petitioners and Hadjipateras in relation to all damage sustained by all the tobacco and licorice root stowed in the #3 compartments—whether resulting from the fire or from the long continued spontane-

ous heating before there ever was any fire,—were governed by the Fire Statute (U. S. C. Title 46, sec. 182); and that rights between your petitioners and Hellenic for all the damage enumerated, were governed by the fire exception of the Carriage of Goods by Sea Act (U. S. C. Title 46, sec. 1304 (2) (b)). The pertinent provisions of those statutes are as follows:

THE FIRE STATUTE (Title 46 U. S. C., section 182):

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

FIRE EXCEPTION OF CARRIAGE OF GOODS BY SEA ACT (U. S. C. Title 46, section 1304 (2)):

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * * *

(b) Fire, unless caused by the actual fault or privity of the carrier."

The District Court held that as Hadjipateras, although living in Piraeus, were ignorant of exactly how the ship was stowed as she lay at Piraeus, they were exonerated from liability under the Fire Statute. It found that Hellenic's supercargo, who supervised the stowage at all ports, fully advised its managing director as to how the vessel was stowed (Opinion, R. 2231, 2235); and that, therefore, it was not en-

titled to the statutory fire exemption (R. 2235). It held, therefore, that Hellenic was liable for the damage sustained by the tobacco and licorice root stowed in the #3 compartments with two exceptions: it held that your petitioner Brown & Williamson Tobacco Corp., was not entitled to recover because its cargo heated spontaneously; and that your petitioner, The American Tobacco Co., was not entitled to recover for heating damage sustained by its Volos tobacco because it was found that this lot also heated spontaneously to some degree (R. 2235-2238). However, recovery was decreed for damage to the latter lot resulting from smoke and contact with water used to extinguish the fire in the Brown & Williamson lot (R. 2244).

Recovery was denied for damage to the two lots which heated spontaneously because, while it was established that they were in good order for carriage on a voyage to United States ports "via Gibraltar," it was found that it had not been established that they were in good order for carriage on the route which the vessel eventually followed (Findings 91-92, R. 2260; Opinion, R. 2237-8).

The Court of Appeals affirmed the decision of the District Court that Hadjipateras were not liable for any of the damage sustained by the cargo stowed in the #3 compartments because, it found, that your petitioners had not "carried the burden of proving that the fire was caused by the shipowner's design or negligence," according to the terms of the Fire Statute.

In considering Hellenic's liability, the Court of Appeals largely limited itself to interpreting the findings of the District Court. It construed the findings as a determination by the District Court that, before

the last lot of 139 bales was stowed in the #3 tween deck, the stowage of that compartment was proper. It then found (R. 2348) "There is no evidence to show precisely how the cargo in #3 tween deck was stowed, or, particularly, where the 139 bales in #3 tween deck were placed when the loading was completed on November 2, 1940." It held that there was "no justification" for inferring in cargo's favor that the 139 bales were so stowed as to impede ventilation. It specifically rejected what it said was the finding below: "that the stowage of the additional 139 bales in #3 tween deck so impeded ventilation of #3 hold as to cause the fire damage to cargo stowed there."

As this Court is interested only in important legal principles of general interest and not in misconceptions of the evidence by a court below, we merely comment in passing on the erroneous assertion of the Court of Appeals (R. 2348, note 6) that the evidence does not include any stowage plan showing how the #3 tween deck was originally stowed, but only plans made on outturn after the cargo had been shifted to fight the fire. The evidence includes a stowage plan produced by Hadjipateras (Exhibit 2, in the separate folder of exhibits) and another given to the owners by Hellenic (Exhibit 3, in the separate folder of exhibits), both prepared at Piraeus before the vessel sailed on her voyage by Hellenic, who stowed the vessel. This mistake was brought to the attention of the Court of Appeals on a petition for a rehearing (R. 2353-2363) but the petition was denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 778

THE AMERICAN TOBACCO CO.; R. J. REYNOLDS TOBACCO CO.; BANK OF GREECE; BROWN & WILLIAMSON TOBACCO CORP.; COMMERCIAL CO. OF SALONICA, LTD.; JOHN D. NICOLAOU and NICHOLAS NICOLAOU, co-partners, doing business as D. Nicolaou Sons & Co.; A. MICHAELIDES, S.A.; and MacANDREWS & FORBES CO.,

Petitioners,

against

J. C., N. C. and A. C. HADJIPATERAS and HELLENIC LINES, LTD.

BRIEF OF J. C., N. C. AND A. C. HADJIPATERAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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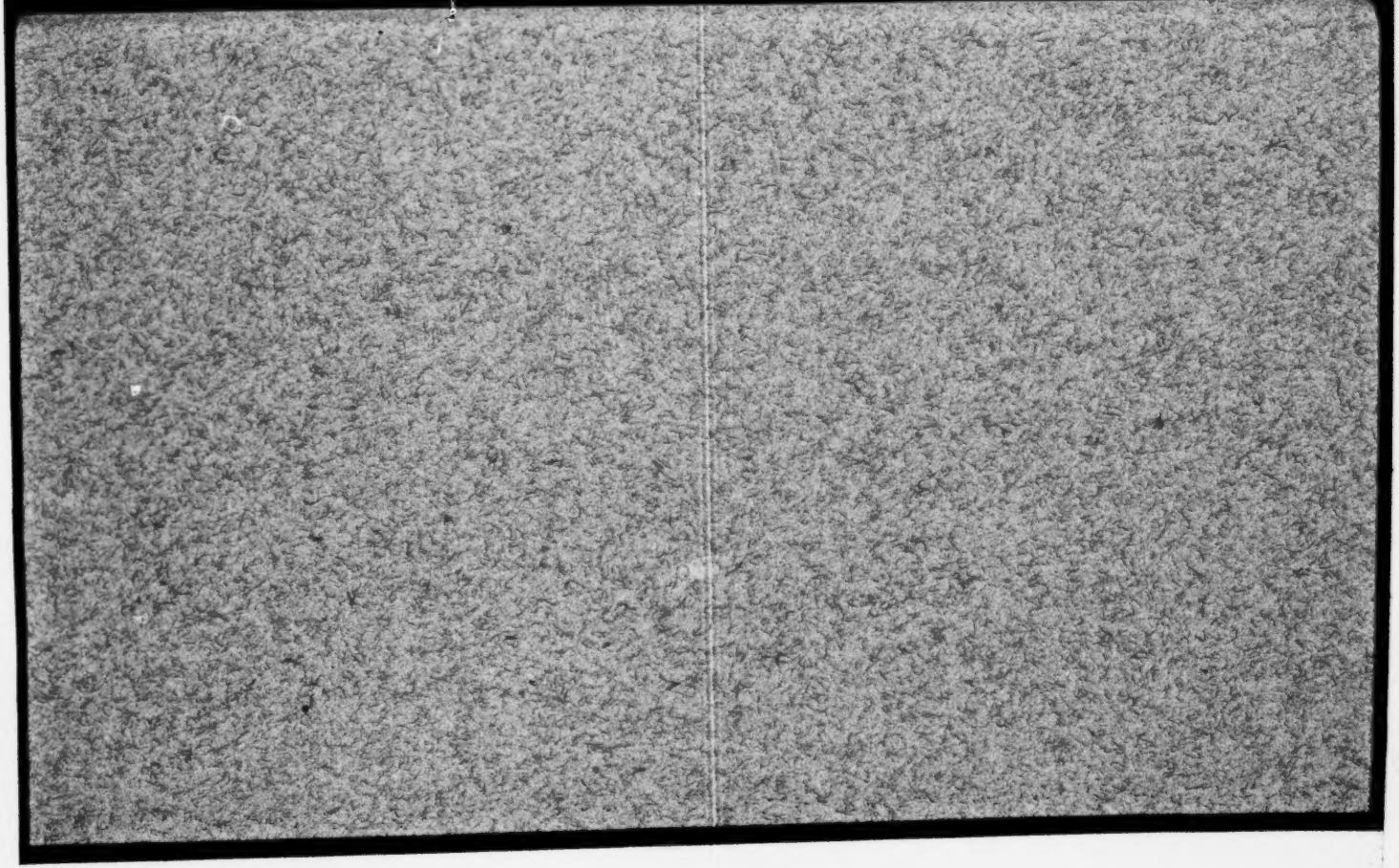

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